CASE and COMMENT

In This Issue

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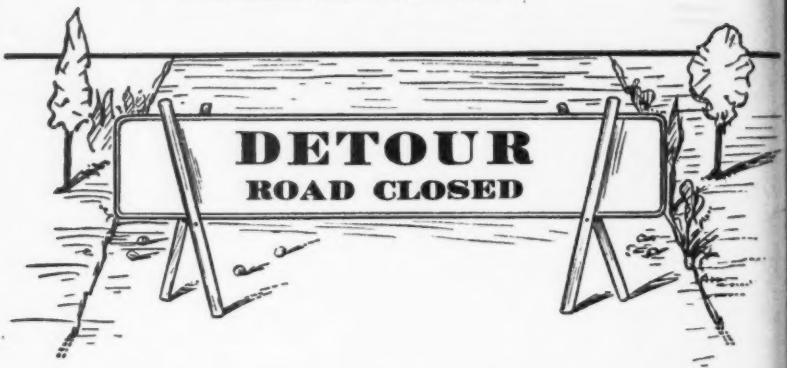
No Detours!



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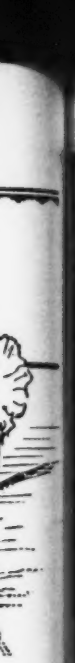

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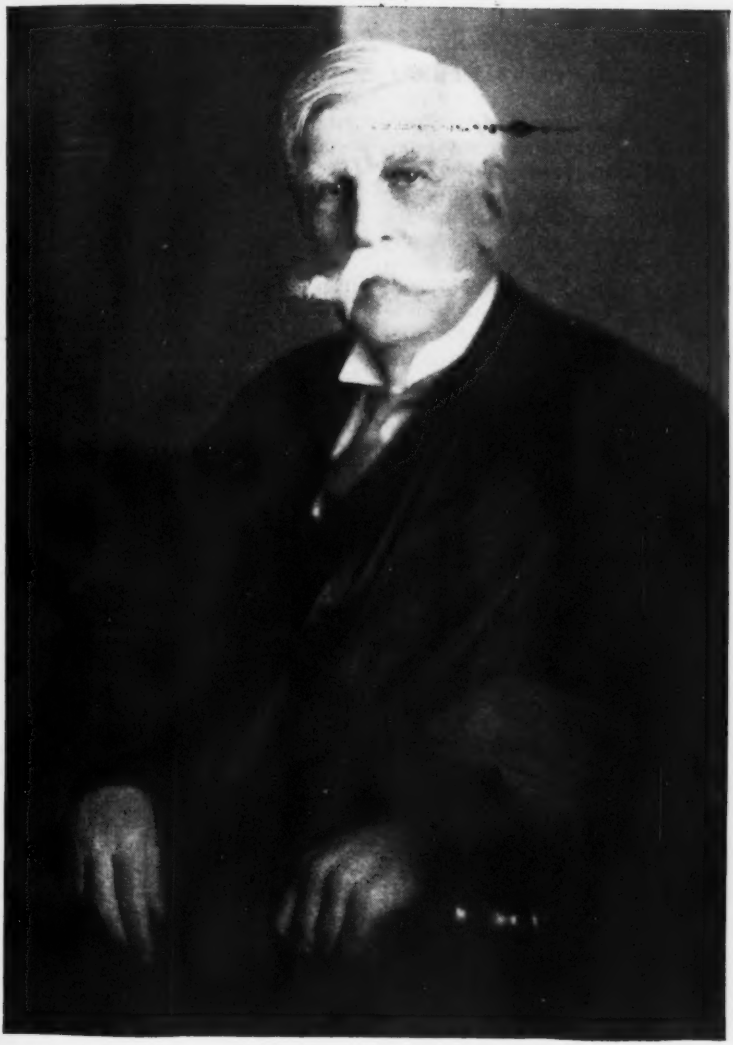


OLIVER WENDELL HOLMES

1841-1935

Leadership or Decay

By Professor Edward S. Robinson, Yale University, from 44 Yale Law Journal 235; Dec. 1934[1]

"DESPITE anthropologists, psychologists, sociologists, economists, and other academic persons who have made a genuine effort to apply the scientific method to the social world, the social philosophy that is actually expressed in public policy is that of the men of law. But there is no reason to believe that this condition will hold indefinitely. Indeed, we have tried to show that, as the gap between naturalistic (scientific) and social thought becomes more and more obvious, we approach a time when legalistic theories of the social process will inevitably be given up. Even the plain man is already uneasy in the presence of these incompatible ways of thinking and as this feeling increases he will be forced to relegate the juristic concepts that have hitherto dominated his social thinking to that realm of antiquities to which he has already dismissed the Scholastic and Calvinistic theologies.

This might be taken to be a prophecy of the decay of the legal profession; and such a result is quite within the bounds of possibility. Practically all recent advances in criminology have been made by psychiatrists and sociologists. Juristic thinkers, when confronted with the problem of crime, seem unable to get an idea on the subject. They fill the air with moral indignation. They talk about the alacrity with which bad men are hanged in England, but they seem unable to say anything of importance on the subject unless they escape from the law and talk psychiatry and sociology. As a group the lawyers view recent governmental developments with alarm. They say that they are afraid of bureaucracy, but it is fairly easy to see that they fear that the solution of commercial, industrial, and agricultural problems will be passed over to men technically trained in these fields who will act with little regard for the concepts and phrases of jurisprudence. They see too plainly that the legal learning in which they have a vested interest is in very real danger of losing its market value.

It is not, of course, inevitable that the legal profession should gradually decay as social pressure requires the services of psychiatrists, economists and other technical men. There is the possibility that, in the face of this pressure, legal theory itself will change and that lawyers will develop a new conception of the task of social engineering. We have seen that such a transition is not easy for a profession which has so long identified its social prestige with its conventional habits of thought, but rising social demands are in the end very likely to be served. Some of the more progressive schools of law are already turning out graduates whose fundamental attack upon social problems is that of the economist rather than that of the jurist. But there is thus far an insufficient realization that this is only a hint of what the future is likely to require. Even in such schools we still find prevailing the idea that economics, psychiatry, and the rest are merely techniques that up-to-date lawyers must learn to use. This frequently results in much confusion. The man who has secured an economic or psychological grasp upon a legal problem is not quite willing to go clear through along that line of thought.

[1] This is the concluding subdivision of Professor Robinson's article "Law on Unscientific Science," 44 Yale Law Journal 235, written from the viewpoint of a psychologist.

Observers of many of the recent governmental hearings in connection with industrial and agricultural adjustments have reported a tendency even for the more progressive men to retreat, under fire, into the old jungles of legal dialectic, where obviously desirable social objectives become logical impossibilities.

And yet the men of law still have before them the opportunity to become leaders in social thinking instead of guardians of outworn ideas. The method of science has been applied to social problems thus far only by the academician and specialist. There is greatly needed a social engineer who will apply that method over a wide front and in the practical solution of urgent social problems.

There is greatly needed a social engineer who, through the application of the best available knowledge, will teach men new and better ways of meeting their problems — of settling their disputes. There is no doubt of the opportunity.

There is simply a question as to whether the lawmen will grasp it or whether the opportunity will, itself, create a new type of public servant—a real social engineer.

Synthetic Courts. A Symposium on Extrajudicial Settlements

Extracts from Article by Philip G. Phillips, Counsel to National Labor Relations Board, in Vol. 83 University of Pennsylvania Law Review 119, Dec. 1934 [1]

THE complacent acceptance or insistence by business on arbitration as an easy avenue of escape from the judicial process in all cases shows lax thinking and little foresightedness on the part of the sponsors of the movement or of its business users.

"'Arbitration' is a blessed word, like 'Mesopotamia.' It tinkles pleasantly on the ear, and suggests a quick and short route by which the terrors of the courts may be avoided in every case. This, I am convinced, is a popular illusion, treasured in the minds of many until put to the crucial test." [2]

In a serious study of the subject, we should not be deluded by the pleasant tinkle of the word. We must realize at the outset that we are talking about a legal device, a legal tool if you will, but nothing more. This tool we must put to the crucial test. And a crucial test means a comparison with the other tools which serve a purpose similar to an arbitration e. g., a reference, an accord and satisfaction, a compromise, an attachment, an injunction, a trial, an admission of the antagonists' contention—all of these are legal tools aimed to settle controversies; arbitration is no more and no less than one of them. Each has its advantages and disadvantages; let us see what light this symposium can throw thereon.

The idea that for better or worse business should turn to its own and not to publicly established processes

[1] The article from which these extracts were taken is designed to serve as a general introduction to the discussion of various phases of arbitration questions treated by other authors in the same issue.

[2] Sir Fletcher Rylands in Bacon, Commercial Arbitration (1928) Introduction.

of law is revolting if its is meant to apply to all business disputes. The arbitration device is too important and too worthwhile to be considered a universal panacea, for when ill-advisedly entered into, it can result most disastrously. The recent Vitaphone [3] controversy, wherein the parties admittedly spent $750,000 on an abortive arbitration, which was followed by court proceedings and an eventual compromise, ought to teach us that the device is not a pleasantly tinkling word and a process always assured of success. We might bear in mind such fiascos as the Willett-Sears case for comparative purposes. But when it becomes more and more common for laws to provide for the specific enforcement of arbitration agreements—making arbitration in effect the sole method of settling disputes once it has been agreed upon, and frequently preventing resort to the courts when they are imperatively needed—we can no longer view arbitration as a playful device wanted by capricious clients. The lawyer can no longer pass it off with a shrug of his shoulders. We should no longer have to rely on business articles and non-legal material. We must view a legal problem *as* a legal problem and not solely as a business device or puzzle, like cost accounting or radio advertising.

The ordinary lawyer has not had wide experience with arbitration; and perhaps because the business man has tried to advance the process as an existing reality he reacts to the process *in toto* on the result obtained by it in the individual case. One good result, and he is "sold" on the process; a contrary one, and he will damn it. It is not fair to take such an attitude. We should examine the process and the arbitration laws impartially, ferret out their weaknesses, praise where praise is due, reform where reform is necessary. Legislative committees, composed of lawyers, all too frequently oppose any bill which seems to encourage arbitration, not on its merits or demerits, but because of an underlying fear that arbitration may cut into fees, already diminishing too fast. And this sort of opposition only whets the appetite of the non-legal members on the floors of the legislatures to pass the bills regardless.

The underlying social objection to arbitration as it is sold today is not that it deprives the lawyer of his fees, but that it deprives the business man of counsel and advice on matters where he needs counsel and legal advice; it denies the lawyer a chance to advise his client of the gravity of waiving all his rights to trial, to injunction, to provisional remedy, to rules of laws, for a mess of pottage sold in the form of standardized arbitration clauses. The Bar must develop a healthy, sane attitude toward arbitration, based on the intrinsic merits of arbitration in the individual case, and on a desire to serve its clients best, with or without it.

Upon a wholesome legal viewpoint depends wholesome arbitration laws. The laws before 1920 in the United States have clearly proven unsatisfactory; but despite professional panegyrics the modern laws passed since 1920 have contributed to even greater unsolved difficulties and perplexities.

The law can do more for the business man than provide him with good arbitration law; it can in many instances provide rules which will make reference to arbitration unnecessary. It may be that despite the alleged anachronisms in our present day trial, despite its cost, delay, and contentiousness, parties can by proper contractual control over adjective law obtain

[3] Vitaphone Corp. v. Electric Research Products, Inc. 19 Del. Ch. 247, 166 Atl. 255, 19 Del. Ch. 354, 167 Atl. 845 (1933).

in regularly organized courts the alleged benefits of an extrajudicial method of settlement. It is for us to decide after analysis its comparative value, and whether it should be utilized in preference to, or in conjunction with extrajudicial tribunals. Certainly it is too important a subject to be dismissed with a bullyish statement that courts will never do. Its connection with extrajudicial tribunals is so obvious that it generally has been erroneously overlooked.

Perhaps extrajudicial tribunals are but a flighty development, a temporary expedient of a business world impatient with the tools provided by law. Perhaps they are a quasi permanent—for nothing can be truly permanent—solution to the difficulties constantly arising because of our fast moving economic life. Perhaps extrajudicial tribunals will be absorbed as was the law merchant. Perhaps from the extrajudicial tribunals the law will learn the needs of business, take the best therefrom and incorporate it in our legal system so that thereafter business will no longer need to turn to its own "courts." Certainly, we feel, the legal order is capable of furnishing business like courts and business like law. Certainly we feel the business man will not complain if we take away the dilatory chicanery in our practice, which he condemns publicly, but expects and asks his counsel to pursue every time he happens to be a defendant in an action. Certainly we trust that the law will be broadminded and far-sighted enough to synthesize the best that business can offer us with already existing legal problems.

The Plague of Judicial Opinions

Extracts from Article by Joseph N. Ulman, Associate Judge of the Supreme Bench of Baltimore City, in Vol. XXXIII, No. 131, The American Mercury 345, Nov. 1934

In conclusion, friends and fellow members of this Association let us ever remember that ours is a profession dedicated to the public interest. From the days of the great Constitutional Convention when our Fathers produced that priceless document which is the cornerstone of our liberties down to this present troubled period, throughout the whole of our history, lawyers have dominated American life. It may be said truly that the greatness of America is the greatness of America's lawyers.

These words might be a quotation from at least one speech delivered at each of the forty-eight State Bar Association meetings held this year. During the same period many leading newspapers have urged thoughtful voters to give the layman preference whenever a lawyer runs against a layman for the State Legislature; and President Roosevelt, faced by unprecedented difficulties and a tottering economic structure, turned for help to college professors rather than to lawyers. Today the vaunted leadership of the bar exists mainly in the imagination of lawyers; the rest of the country wonders how successful the lawyers will be in their efforts to block reform.

This eclipse of the leadership of lawyers in American life is not a recent phenomenon, and at least one po-

tent reason for it is to be found in the mechanics of our legal system. Elsewhere I have described the American lawyer as a man with his eyes in the back of his head; and he must be so if he is to be a good lawyer. It is well known that the common law is primarily a system of precedents; yet I am sure few laymen realize the extent to which that system has buried itself in a mass of printed pages that obscures thought, stifles initiative, and stultifies its practitioners.

If all the judicial opinions written and printed in a single year in the United States were laid end to end they would reach from confusion to futility. Judicial logorrhea has become a disease that will soon call for psychiatric treatment if the legal profession itself does not seek and find a cure for it.

American lawyers, however, are positive that this system of precedents is the wisest and best system of law ever conceived by the mind of man; and I do not hope even faintly to see it supplanted by any other system. Even a revolution might fail to disturb so deeply rooted a folkway. Nevertheless, other peoples have achieved something they fondly believe to be civilization without laying upon their legal systems this blighting hand.

It would transcend the limits of this paper to attempt to rehearse even briefly the arguments pro and con upon the supposed advantages of the common law system versus the code system. The strange thing is that the advocates of each ascribe to it precisely the same virtues that they deny to the other. Uniformity, certainty, flexibility—these are supreme in common-law countries, non-existent in code countries, according to the testimony of common lawyers.

In fact, so deeply ingrained is our habit of writing judicial essays that when we deliberately set out to simplify and to render uniform any small segment of the law by reducing it to codified form, we begin almost immediately to undo what we have done by writing long-winded expository opinions about it. That has been the history of the Uniform Negotiable Instruments Law, for example; and that will be the history of every attempt to simplify the common law so long as our judges allow themselves the untrammeled luxury of writing an opinion in support of every decision they hand down.

The trouble is that we behave as though we have no real confidence in our own institutions and in the officials we set to man them. Most of our State constitutions make it mandatory that decisions of their highest courts shall be supported by written opinions.

But does it follow that the judge's statement of reasons must take the form of a long essay and that it must be printed? Most judicial opinions are mere repetitions of the obvious; few would ever see the light of day if subjected to the editorial approval of any competent critic of the English language. A common law judge is the only author in the world who can be assured of the publication and sale of his literary output no matter how poor it is.

What, then, are we to do about it? I find a suggestion of an answer in one of Mr. Justice Cardozo's brilliant pages. He says:

"Of the cases that come before the court in which I sit, a majority, I think, could not, with semblance of reason, be decided in any way but one. The law and its application alike are plain. Such cases are predestined, so to speak, to affirmance without opinion. In another and considerable percentage, the rule of law is certain, and the application alone doubtful. A complicated record must be dissected; the narratives of witnesses must be analyzed to determine whether a given situation comes within one district or another upon the chart of rights and wrongs. The traveler who knows that a railroad

crosses his path must look for approaching trains. That is at least the general rule. In numberless litigations the description of the landscape must be studied to see whether vision has been obstructed, whether something has been done or omitted to put the traveler off his guard. Often these cases and others like them provoke difference of opinion among judges. Jurisprudence remains untouched, however, regardless of the outcome. [Finally, there remains a percentage, not large indeed, and yet not so small as to be negligible, where a decision one way or the other, will count for the future, will advance or retard, sometimes much, sometimes little, the development of the law. These are the cases where the creative element in the judicial process finds its opportunity and power.]"

If the constitution of your State compels you to file a written opinion in every case, see to it that the constitution is amended. That simple remedy ought not to be impossible of achievement. The American people really do believe in the mental and moral integrity of its judges and would accept decisions of its high courts even if they were not backed up by confused and confusing opinions. After all, only 6% of the whole number of cases tried ever reach appellate courts and give rise to judicial essays. The other 94% are heard before judges who decide them and have done with them. The losing side curses the judge, perhaps; but the appellate judge who files a written opinion is cursed no less roundly.

The Public Influence of the Bar[1]

By Justice Harlan F. Stone, of the U. S. Supreme Court, from 48 Harvard Law Review 1, Nov. 1934

"We meet at a time when, as never before in the history of the country, our most cherished ideals and traditions are being subjected to searching criticism. The towering edifice of business and industry, which had become the dominating feature of the American social structure, has been shaken to its foundations by forces, the full significance of which we still can see but dimly. What had seemed the impregnable fortress of a boasted civilization has developed unsuspected weaknesses and in consequence we are now engaged in the altogether wholesome task of critical re-examination of what our hands have reared.

From this inquiry the law and the lawyer may claim no immunity. It is true, if tradition and history are guides, that we may rightly look to the Bar for leadership in the preservation and development of American institutions. Specially trained in the field of law and government, invested with the unique privileges of his office, experienced in the world of affairs, and versed in the problems of business organization and administration, to whom, if not to the lawyer, may we look for guidance in solving the problems of a sorely stricken social order?

No tradition of our profession is more cherished by lawyers than that of its leadership in public affairs. We dwell upon the part of lawyers in the creation of the Federal Constitution and in the organization of the national government and of our federal and state judicial systems. The rôle they played in politics and government in the first half of the last centu-

[1] Extracts from an address delivered at the dedication of the Law Quadrangle, University of Michigan, on June 15, 1934.

ry is a familiar part of our history. . . . The great figures of the law stir the imagination and inspire our reverence according as they have used their special training and gifts for the advancement of the public interest. Coke, standing steadfast against the encroachment of the Crown on the prerogatives of parliament; John Hampden, with his group of famous counsel resisting in the courts the levy of ship money by the Crown; James Otis, the stalwart defender of the right of free speech, throwing up his commission as Advocate General of Massachusetts to argue against writs of assistance; John Marshall, with prophetic vision, welding the clashing states into a united nation; all are names to which we recur as symbols of the power of public leadership exercised by the Bar at its best. . . .

And so I recur to the question which I raised a little time ago, whether Mr. Cook was right in his belief that we can continue to look to the Bar for the preservation and development of American institutions, and I answer it confidently in the affirmative. It will realize that expectation as he contemplated that it would, through the growing influence of the law schools, whose character, as he declared, determines the character of the legal profession, through closer association and cooperation of this and other schools of law with the Bar in the worthy task of building up a new morale in the profession, fitted to the new conditions under which it must do its work. It is a happy augury for the future that the central idea around which this institution, so nobly conceived, has been built is that the continued capacity of the profession to guide the development of American institutions involves an educational process in which its schools rightly have their part."

Are Unfair Methods of Competition Actionable at the Suit of a Competitor?[1]

Extracts from Article by Grover C. Grismore, Professor of Law, University of Michigan, 33 Michigan Law Review 321, Jan. 1935

THE steps which have recently been taken, both through Federal and state legislation, to regulate trade practices by outlawing what have been denominated "unfair methods of competition" have brought to the fore a problem that has vexed lawyers and legal writers for a long time. The question is whether a competitor who has been injured as a result of a rival's use of one of the condemned methods of competition can maintain any action either at law or in equity against the wrongdoer.

Two lines of inquiry suggest themselves at the outset: (1) Has the common law developed any general principles which justify the conclusion that a man is committing a legal

[1] In this article Professor Grismore discusses the problem both at common law and under the statutes. These extracts have been taken from that portion of his article dealing with the situation at common law.

wrong against his competitor when he engages in what we today know as unfair competition? (2) Assuming such general principles to exist, is there anything in the applicable state of Federal statutes which would preclude the application of those principles either in general or specifically to those types of cases in which the competition alleged to be legally unfair is so only because it is made unfair by statute?

It is perfectly clear that no nominate tort of unfair competition, in the sense in which we use that phrase today, has even been recognized by the common law. The later common law of this country, it is true, did know a tort which it sometimes called "unfair competition," but the phrase so used was simply another name for one particular kind of unfair competition, namely, "passing off," as distinguished from what is known as trade mark infringement.

On the other hand, there is a fundamental principle running through the law of torts which would justify our saying that unfair competition is actionable. This is the principle that when one man intentionally inflicts temporal damage upon another he must make recompense to that other, unless he can justify his conduct. While it has been asserted that such a generalization is not warranted by the decided cases, there is weighty authority in its support. Certainly he who makes this assertion has the burden of proof, since he casts a reproach upon our law which it ought not to have to bear. It is inconceivable that a matured legal system such as ours should be so inflexible as to adhere indefinitely to the view that relief for an injury can be had only if the particular conduct falls within the limits of some nominate tort, such as assault, deceit, defamation, etc. Obvious as this would seem to be, it will have to be admitted that the courts have been slow to recognize this general principle as applicable in cases involving trade relationships.

This reluctance on the part of our courts to recognize that a trader has any general right to be protected in his interest in anticipated business relationships becomes especially apparent when we consider the evolution of the law relating to trade marks and trade names. In this field, it has given rise to the anomalous distinction between "trade marks" and "trade names" with its concomitant distinction between an action for trade mark infringement and one for so-called unfair competition. In the earliest cases dealing with this question it was held that one was not entitled to relief against "passing off" through the use of one's trade marks unless the wrongdoer was guilty of fraud and deceit. Deception has, of course, always been recognized as tortious conduct. The only difficulty encountered in working out the trade mark user's right to relief on this theory was that it was not he who had been deceived. The one deceived was the prospective customer whose patronage the wrongdoer had diverted.

It has been the law from a very early day that if one diverts a competitor's patronage by intimidating his customers by means of an assault, an action will lie.

The common law has, of course, always recognized as deserving of legal protection one's interest in having his reputation unsullied. Consequently, the diversion of custom through what amounts to a slander or libel has long been actionable.

So-called slander of title and disparagement of property appear to be offshoots, in part from those cases in which the interest protected is the personal reputation of the plaintiff, and in part from the cases holding that the plaintiff is entitled to protection against harm resulting incidental-

ly from the deception of third persons.

After considerable hesitation our law has come to recognize and to give legal protection to a proprietary interest in contract relationships. So far has this development now gone that mere competition is under no circumstances a justification for inducing breach of contract.

So also it is generally agreed that one who obtains a competitor's trade secret, either by fraud or by inducing a breach of confidence, is guilty of an actionable wrong.

On the other hand, diversion of custom by coercion of a competitor's customers by conduct not tortious as to others or criminal has generally been held not to give the competitor a right of action.

Somewhat inconsistently, it would seem, it has been held that one who is not a rival is liable if he diverts another's patronage unless he has a valid justification for his conduct.

Apparently for a time it was thought that the cases in which relief for unfair competition had been given could be generalized on a theory of malice —on the basis of the idea that a person has a legal right to be free from injuries caused by acts done maliciously, and that therefore malicious acts are *per se* tortious. It soon became clear, however, that no such general right had ever been recognized. Moreover, were it to be recognized, it would not cover all of the cases in which relief for unfair competition has been given without giving the term "malice" connotations which it can hardly be said to bear, so that it would be worthless as a guide to decision.

What is the explanation of this unwillingness of the courts, especially in suits by a competitor, to recognize as worthy of legal protection the trader's general interest in freedom to enter into anticipated business relationships? It cannot be said that they do not regard the interest as legitimate one. We have already seen that they did give it indirect protection in many cases and direct protection in cases in which the defendant was not a rival. Also, the common law gave this interest a proprietary character for some purposes. It was early recognized that what was called "good will," which was simply another name for this interest, is a valuable asset, capable of legal transfer by bequeather or sale. Indeed, the common law was willing to facilitate its transfer by making an exception to its usual doctrines as to contracts in restraint of trade. It recognized that the seller might properly enter into an agreement that would be in unlawful restraint of trade, were it not for the fact that his agreement was essential to enable the trader to make the most out of his good will.

The probabilities are that the law, as it did in fact develop, was the result of a subconscious but perfectly natural reaction against the state of affairs that existed in England prior to the Industrial Revolution. In those days monopoly was the rule and competition the exception. What with the market monopolies, the guild monopolies, and monopolies based upon the royal patent, both in national and international trade, there was but little opportunity for the free play of competition. It was only after a long struggle that these fetters were cast off and men became free to engage in trade and business at will. It is not strange that in the course of that long struggle freedom to engage in business should have become a fetish; that it should have come to be looked upon as one of man's God-given or natural rights.

This is in accord with the history of the development of human institutions in general. In that history we find that the reaction from one extreme usually leads to the other.

is only after both extremes have been tested and found wanting that we are able to reach the safe middle ground. It is true there are not wanting those who, having forgotten this history, contend that competition is an outworn and outmoded conception; that what we need is regulated monopoly. However, we do not need to go so far in order to espouse the view that a competitor should have relief against the excesses of competition. All we need to do is to recognize that the pendulum swung too far in its reaction from monopoly when it refused to recognize as basic and as worthy of legal protection the general interest in freedom from diversion of expected patronage. All we need to say it that he who would compete must justify his competition by showing that it is fair as judged by the prevailing standards of business conduct. The difficulty in the past has grown very largely out of the fact that judges have been wont to speak in terms of absolutes, particularly as regards the right to compete. Of course, there is no absolute right either to compete or to be free to enter into anticipated business relationships. Both interests are worthy of legal recognition within limits that can be satisfactorily defined and reconciled on the basis of the principle of fair competition.

It appears, therefore, that unless we are prepared to reject the principle which was accepted by the Supreme Court in the Associated Press case, and to revert to the irrationality and inflexibility that resulted from the accidental, historical fact that our legal principles in their infancy had to develop in the framework of a rigid formulary system of procedure, there is no reason for saying that a competitor may not have redress for injuries caused by the use of an "unfair method of competition."

Among the New Decisions

Attachment — *of redemption money.* In Allen v. Larson, — N. D. —, 94 A.L.R. 1046, 256 N. W. 178, it was held that where money is in the hands of the sheriff for the redemption of property sold under mortgage foreclosure, and there is no duty upon the part of the sheriff except to pay the money to the holder of the certificate of sale, such money is subject to attachment while in the possession of the sheriff.

Annotation: Redemption money in hands of officer as subject to attachment, garnishment, or execution. 94 A.L.R. 1049.

Attorney's lien — *defendant's duty to protect.* In Noell v. Missouri Pacific Railroad Company, — Mo. —, 94 A.L.R. 684, 74 S. W. (2d) 7, it was held that a defendant against whom judgment was taken for an amount fixed by agreement between the parties and who before paying it immediately informed the attorney for the plaintiff in an action brought in another state on the same cause of action of the fact that judgment had been obtained, notified him to take such steps as he should deem necessary to protect his lien, and instituted a proceeding in a court of equity to impound the judgment for the purpose of having claims thereto determined, is under no such duty to litigate in such proceeding the existence and validity of the lien as will render him liable for the amount of the lien because of his failure to do so.

Annotation: Affirmative duty of defendant to protect lien of plaintiff's attorney. 94 A.L.R. 695.

Banks — *computing dividends to secured creditor on insolvency.* In First Wisconsin National Bank of Milwaukee v. Kingston, 213 Wis. 681, 94 A.L.R. 465, 252 N. W. 153, it was held that a secured creditor of an insolvent bank is entitled to dividends upon the full amount of his claim until such claim is fully paid, rather than upon the balance remaining after crediting thereon the amount realized by the enforcement of the security.

Annotation: Treatment of collateral held by creditor of insolvent or bankrupt. 94 A.L.R. 468.

Banks — *multiplicity of suits as to stockholder's liability.* In Broderick v. American General Corporation, 94 A.L.R. 1359, 71 F. (2d) 864, it was held that equity has no jurisdiction, on the ground of prevention of multiplicity of suits, of a suit by a state superintendent of banks as official liquidator of an insolvent bank against a number of its stockholders to collect a statutory assessment determined by him to be necessary.

Annotation: Jurisdiction of equity on the ground of avoiding multiplicity

of actions at law of suit to enforce statutory liability of stockholders or to enjoin actions at law in that regard. 94 A.L.R. 1372.

Bloodhound evidence — *laying foundation for.* In Bullock v. Commonwealth, 249 Ky. 1, 94 A.L.R. 407, 60 S. W. (2d) 108, it was held that the qualifications of a dog to follow the trail of a human being, so as to render admissible evidence that starting from the scene of a murder he trailed to the home of accused, are sufficiently established by the testimony of his owner, detailing the method used in training the dog, the length of time it had been trained, its aptness, accuracy, experience, and dependability, and that he had purchased both the father and the mother of the dog as full-blooded pedigreed bloodhounds, although he was unable to swear that the dog had no other blood than that of a pedigreed bloodhound.

Annotation: Evidence of trailing by dogs. 94 A.L.R. 413.

Bonds — *increase in public officer's duties.* In City of Rice Lake v. Jensen, — Wis. —, 94 A.L.R. 609, 255 N. W. 130, it was held that where a city council acted within its authority in requiring the city clerk to discharge the duties of comptroller and of cashier of city-owned utilities, his bond for the faithful performance of the duties of clerk covers defalcations as cashier of the utilities and neglect of duty as comptroller.

Annotation: Liability on bond of public official or employee as affected by change in principal's duties. 94 A.L.R. 613.

Chattel Mortgage — *lien on crops grown after mortgagor's death.* In Fawcett Inv. Co. v. Rullestad, — Iowa, — 94 A.L.R. 800, 253 N. W. 131, it was held that a mortgage of crops to be grown on certain land is ineffective as against the heirs of the mortgagor to create a lien on crops grown after his death.

Annotation: Chattel mortgage on crops to be grown, or provision in real estate mortgage covering such crops, as affected by death of mortgagor or sale of land before crop is planted. 94 A.L.R. 803.

Conflict of Laws — *action by wife against husband.* In Gray v. Gray, — N. H. —, 94 A.L.R. 1404, 174 A. 508, it was held that the fact that a wife is not precluded by the law of the state of the matrimonial domicil from suing her husband for negligence does not enable her to sue him there for injuries sustained in an automobile accident in another state under the law of which she could not have sued him.

Annotation: Conflict of laws as to right of action as between husband and wife or parent and child. 94 A.L.R. 1410.

Contracts — *agreement to indemnify county against expense of attempt to extradite if it proves unsuccessful.* In Milwaukee County v. B. D. Van Den Berg, — Wis. —, 94 A.L.R. 352, 255 N. W. 65, it was held that an agreement to indemnify the county against the expense of extradition proceedings if the attempt to extradite should prove unsuccessful is without consideration and void as against public policy.

Annotation: Bond to indemnify public against expense of extradition or other criminal proceedings in event they are unsuccessful as contrary to public policy. 94 A.L.R. 355.

Contracts — *promise to pay when able.* In Mock v. Trustees of First Baptist Church of Newport, 252 Ky. 243, 94 A.L.R. 716, 67 S. W. (2d) 9, it was held that an agreement by an architect who had prepared plans for a church edifice, to wait for a balance due him for his services until such

time as the church, in its judgment and discretion, should be financially able and deem it advisable to erect and complete the building, does not require him to wait more than a reasonable time, even though at the end of that time the church does not regard itself as being financially able to complete the structure.

Annotation: Construction and effect of promise to pay when promisor is able. 94 A.L.R. 721.

Constitutional Law — *preference of particular classes of employees in payment of wages.* In McErlain v. Taylor, — Ind. —, 94 A.L.R. 1284, 192 N. E. 260, it was held that a statute creating a preference in the distribution of the assets of an insolvent employer in favor of "manual and mechanical laborers," as against all other types of wage-earning employees, is unconstitutional as making a classification for which there is no reasonable basis.

Annotation: Constitutionality of statute giving a lien for, or preferring claims of employees for, wages in case of insolvency of employer. 94 A.L.R. 1287.

Damages — *funeral expenses as element of.* In State v. Cohen, — Md. —, 94 A.L.R. 427, 172 A. 274, it was held that funeral or mourning expenses are not elements of the damages recoverable in a death action.

Annotation: Funeral expenses as element of damages for wrongful death. 94 A.L.R. 438.

Divorce — *change of provision as to alimony or support of children.* In Adair v. Superior Court, — Ariz. —, 94 A.L.R. 328, 33 P. (2d) 995, power retroactively to modify provisions of a divorce decree with respect to alimony or the support of children, so as to increase or reduce the amount of instalments after they have become due, was held not conferred by a statute authorizing the court to amend, revise, and alter such provisions as may be just and as the circumstances of the parents and the welfare of the children may require.

Annotation: Power of court to modify provisions of divorce decree for alimony or support of child as respects past-due instalments. 94 A.L.R. 331.

Dogs—*damages for killing.* In Wilcox v. Butt's Drug Stores, Inc., — N. M. —, 94 A.L.R. 726, 35 P. (2d) 978, it was held that damages for causing the death of a dog can include no allowance for its sentimental value to its owner.

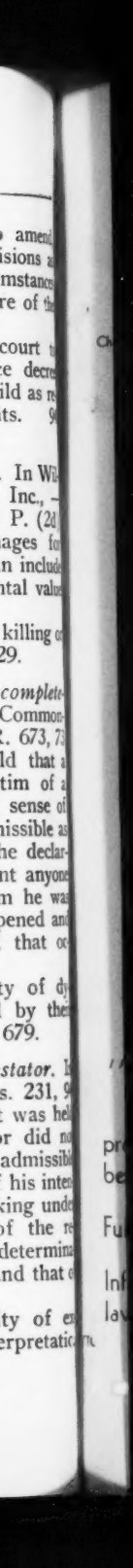
Annotation: Damages for killing or injuring dog. 94 A.L.R. 729.

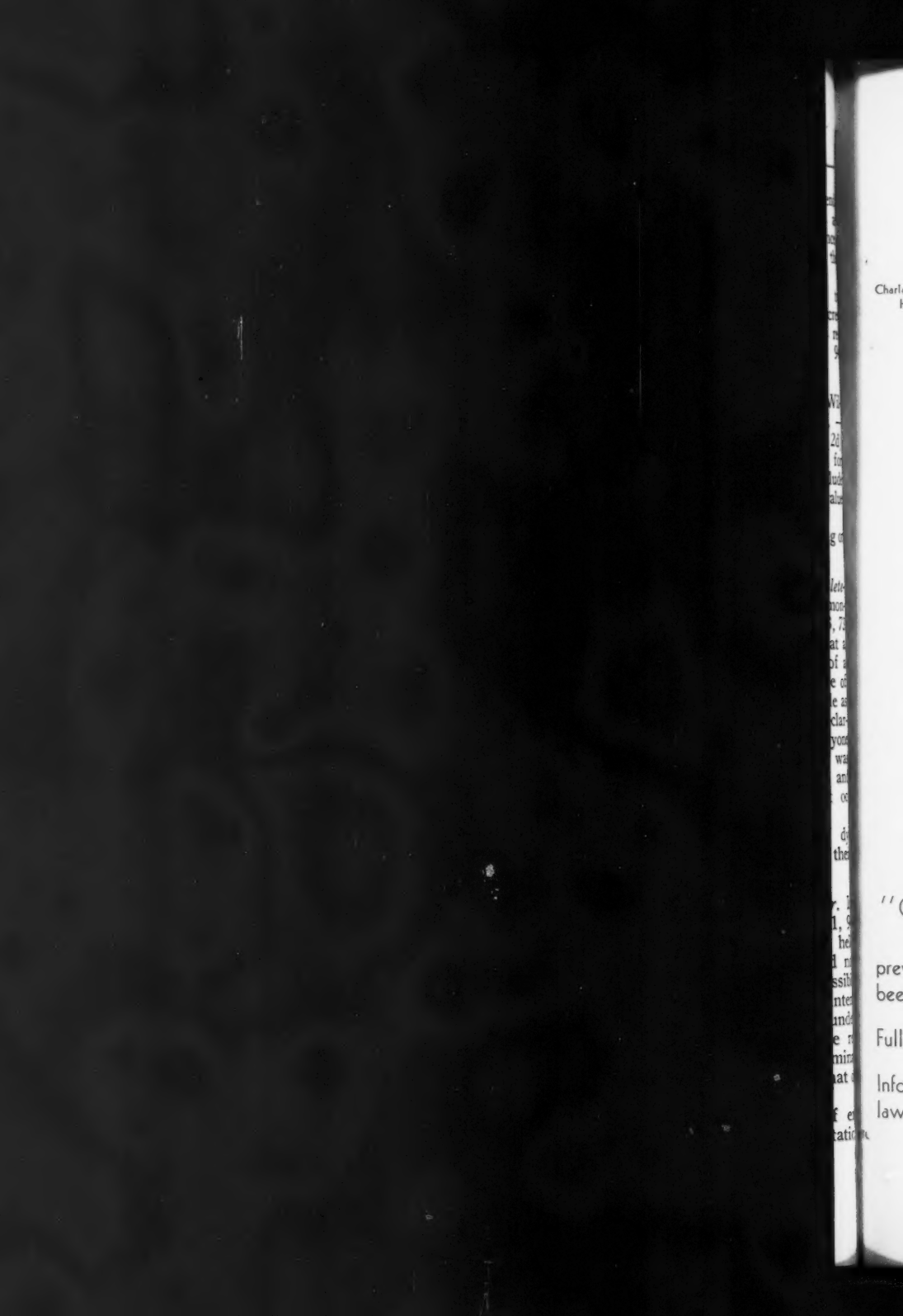
Dying Declarations — *incompleteness of.* In Daughters v. Commonwealth, — Ky. —, 94 A.L.R. 673, 73 S. W. (2d) 10, it was held that a statement made by the victim of a homicide, though under the sense of impending death, is not admissible as a dying declaration where the declarant said that he did not want anyone else but the person to whom he was talking to know how it happened and that he was not telling all that occurred.

Annotation: Admissibility of dying declarations as affected by their incompleteness. 94 A.L.R. 679.

Evidence — *intent of testator.* In Calder v. Bryant, 282 Mass. 231, 94 A.L.R. 18, 184 N. E. 440, it was held that evidence that a testator did not like his wife's relatives is admissible as bearing on the question of his intention to exclude her from taking under a bequest to his "heirs" of the remainder expectant upon the determination of a trust for her life and that of a daughter.

Annotation: Admissibility of extrinsic evidence to aid interpretation of will. 94 A.L.R. 26.





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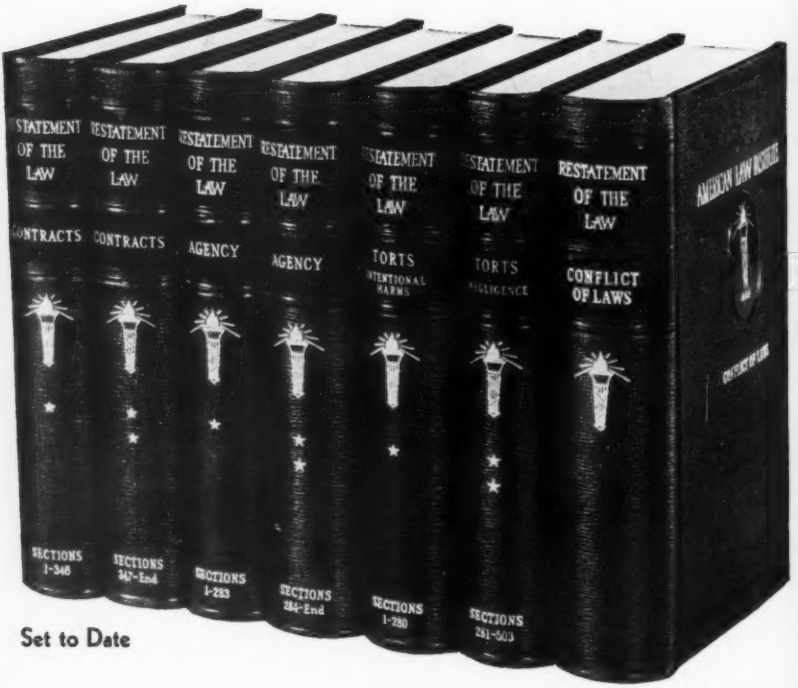

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Evidence — *opinion evidence as to speed.* In Enghlin v. Pittsburg County Railway Company, — Okla. —, 94 A.L.R. 1180, 36 P. (2d) 32, it was held that persons of intelligence and observation may testify as to the speed of a moving automobile without qualifying as experts; the lack of expert knowledge concerning such matter affects the weight to be given by the jury to such evidence rather than the competency of the witness.

Annotation: Opinion evidence as to speed of automobile. 94 A.L.R. 1190.

Exemplary damages — *in action for death.* In Florida East Coast Railway Company v. McRoberts, 111 Fla. 278, 94 A.L.R. 376, 149 So. 631, it was held that exemplary damages are not recoverable under statute creating in favor of the statutory beneficiaries a right of action for causing the death of a person under circumstances which would have enabled the injured person himself to maintain an action had he lived, for such damages as the persons entitled to sue may have sustained by reason of the death of the person killed,—even where the facts of the case would warrant the recovery of punitive damages had not death ensued from the negligence proved.

Annotation: Exemplary or punitive damages as recoverable in action for death. 94 A.L.R. 384.

Exemptions — *automobile used for going to and from work.* In Julius v. Druckrey, — Wis. —, 94 A.L.R. 293, 254 N. W. 358, it was held that an automobile used by a debtor in going to and returning from his place of work may be found to be "used or kept for the purpose of carrying on the debtor's trade or business" within the meaning of a statute exempting from seizure on execution any automobile so used.

Annotation: Exemption of automobiles from seizure for debt. 94 A.L.R. 299.

Extradition — *inquiry into motive for requisition.* In People v. Murray, 357 Ill. 326, 94 A.L.R. 1487, 192 N. E. 198, it was held that a state statute providing for the release of one whose extradition is sought, if the requisition was not made in good faith but for some ulterior purpose other than the punishment of crime, is void as conflicting with the intent and meaning of the extradition clause of the Federal Constitution.

Annotation: Motive or ulterior purpose of officials demanding or granting extradition as proper subject of inquiry. 94 A.L.R. 1493.

Insurance — *effect of reinstatement on incontestable clause.* In Illinois Bankers' Life Association v. Hamilton, 188 Ark. 887, 94 A.L.R. 1194, 67 S. W. (2d) 741, it was held that the incontestable clause of a life insurance policy, and a provision therein making reinstatement in case of lapse conditional only on the furnishing of satisfactory evidence of insurability and the payment of all past-due premiums with interest, operate to preclude the insurer from conditioning the validity of the reinstated policy upon the truth of the representations made by the insured in the application for reinstatement, or from setting up misrepresentations therein, where the original contestable period had expired.

Annotation: Insurance: incontestable clause as affected by reinstatement. 94 A.L.R. 1200.

Former Jeopardy — *conviction of lewd and lascivious conduct as affecting prosecution for adultery.* In State v. Brooks, — Wis. —, 94 A.L.R. 401, 254 N. W. 374, it was held that a conviction on a charge of lewd and lascivious conduct does not constitute a

bar to the prosecution of the defendant for adultery based on the same conduct.

Annotation: Conviction or acquittal on charge which includes element of illicit sexual intercourse as bar to prosecution for adultery. 94 A.L.R. 405.

Injunction — *against unlicensed practice of law.* In Fitchette v. Taylor, — Minn. —, 94 A.L.R. 356, 254 N. W. 910, it was held that injunction is a proper remedy to prevent such practice, when asked by attorneys acting for themselves and other affected members of their profession. The character of their special right to practise law, as a special privilege or franchise and so a property right, is enough to justify relief by injunction.

Annotation: Injunction as proper remedy to prevent unlicensed practice of law. 94 A.L.R. 359.

Insurance — *failure of attempted appraisal of loss.* In Norwich Union Fire Insurance Society v. Cohn, 94 A.L.R. 494, 68 F. (2d) 42, it was held that an insured who has, by nominating a competent and disinterested appraiser, complied with a provision of a fire insurance policy for an appraisal in case of disagreement as to amount of loss, may, if the appraisal fails without his fault, bring an action on the policy without seeking or consenting to further appraisals, notwithstanding the policy provides that the loss shall not become payable until sixty days after its ascertainment, "including an award by appraisers when appraisal has been required," where the policy also provides that no suit thereon shall be sustainable "until after full compliance by the insured with all the foregoing requirements, nor unless commenced within twelve months next after the fire."

Annotation: Failure of attempted appraisal under policy of insurance as affecting rights and remedies of parties. 94 A.L.R. 499.

Malicious Prosecution — *probable cause.* In Groda v. American Stores Company, 315 Pa. 484, 94 A.L.R. 738, 173 A. 419, it was held that in an action for malicious prosecution, neither an acquittal of the defendant in the criminal prosecution, nor the ignoring of a bill against him by the grand jury, nor his discharge by the examining magistrate, constitutes proof of want of probable cause or shifts the burden of proof to the defendant in the civil action.

Annotation: Acquittal, discharge, or discontinuance as evidence of want of probable cause in action for malicious prosecution. 94 A.L.R. 744.

Mortgage — *effect of financial depression on enforcement.* In Federal Land Bank of Omaha v. Wilmarth, — Iowa, —, 94 A.L.R. 1338, 252 N. W. 507, it was held that equity will not refuse to foreclose a mortgage because a financial depression has abnormally depreciated the market value of the mortgaged property and made money more valuable than it was at the time the loan was made.

Annotation: Financial depression as justification of moratorium, or other relief to mortgagor. 94 A.L.R. 1352.

Parol Evidence — *identity of legatee.* In Northern Trust Company v. Perry, 105 Vt. 524, 94 A.L.R. 7, 168 A. 710, it was held that upon the issue whether Albert George Perry, rather than his father, Albert Perry, was the intended beneficiary of a bequest in the will of a female relative to "Albert Perry," evidence that when Albert George Perry took leave of testatrix on the occasion when he had been introduced to her as "Cousin Albert," she said that his father and mother were to be congratulated on having such a son and that she wished

that there were more boys to carry the name down (her name being Perry), was admissible, over the objection that it was hearsay, to show that testatrix was kindly disposed to him, that he had made a good impression upon her, and that she knew him as "Albert Perry."

Annotation: Admissibility of extrinsic evidence to aid in interpretation of will. 94 A.L.R. 26.

Principal and agent — *authority to indorse check.* In Rosacker v. Commercial State Bank, — Minn. —, 94 A.L.R. 551, 254 N. W. 824, it was held that an attorney engaged merely to make a collection has no implied authority to indorse for his client a check received in payment of the claim. Exceptional circumstances might imply the power, but we do not find them here.

Annotation: Authority of agent to indorse and transfer commercial paper. 94 A.L.R. 555.

Principal and Surety — *paid surety, rule of construction.* In New York Indemnity Company v. Hurst, 252 Ky. 59, 94 A.L.R. 864, 66 S. W. (2d) 8, it was held that while the obligations of an uncompensated surety are strictly construed in favor of the surety, those of compensated sureties are to be construed most strongly against the surety and in favor of the indemnitee.

Annotation: Liability of surety company as distinguished from that of gratuitous surety. 94 A.L.R. 876.

Public Bonds — *facsimile signature on.* In Smith v. Curran, 267 Mich. 413, 94 A.L.R. 766, 255 N. W. 276, it was held that the requirement of a city charter that all bonds issued by the city shall be signed by the mayor, countersigned by the comptroller, and attested by the city clerk, and bear a statement to be signed by the city treasurer, is not satisfied by facsimile signatures printed on bonds, so as to render it incumbent on the comptroller to countersign bonds so prepared even though the use of facsimile signatures may have been authorized by the common council.

Annotation: Printing, lithographing, or other mechanical signature on public bonds, coupons, or other public pecuniary obligation. 94 A.L.R. 76[illegible]

Public Officers — *liability for mistakes in records.* In Fisher v. Levy, Clerk, 180 La. 195, 94 A.L.R. 12[illegible], 156 So. 220, it was held that a recorder of mortgages and the surety on his bond are liable for the loss sustained by one who loaned money on the faith of a record which erroneously showed that the inscription of a certain mortgage had been canceled, where the cancelation was made by a deputy without due investigation.

Annotation: Liability of officer charged with duty of keeping record of instruments affecting title to or interest in property for mistakes or defects in respect to records. 94 A.L.R. 1303.

Railroads — *use of lands in right of way.* In Voorhies v. Pere Marquette Railway Company, 263 Mich. 431, 94 A.L.R. 520, 248 N. W. 86[illegible], it was held that it is not beyond the charter powers of a railroad company to lease surplus land of its right of way which it owns in fee absolute, for the drilling of gas and oil wells, so long as the operations do not interfere with its railroad business or endanger the public safety, as is the case where an unimportant branch line runs through wild and unoccupied land devoted to the production of oil and gas, and no greater danger will result from drilling on the right of way than on the adjacent property.

Annotation: Right of railroad company to use or grant use of land in right of way for other than railroad purpose. 94 A.L.R. 522.

Current U. S. Decisions Selected from Law. ed. Advance Opinions

The Gold Clause Cases—private contracts—gold certificates—Liberty Bonds.

The long awaited momentous decision of the Supreme Court in the gold clause cases which tested the validity of the New Deal Gold Policy was handed down on Monday, February 18, 1935. The decisions, which must be regarded as favorable to the government, are among the most important ever handed down by that great tribunal. The same sharp cleavage which has divided the court in recent cases into a liberal majority and a conservative minority is apparent in the five to four line-up in each of the cases, one dissenting opinion serving to indicate the view of the minority. The court's treatment of these cases in the order in which they were handed down follows.

Gold Clause in Private Contracts.

In the first case, Norman v. Baltimore Ohio R. R. 79 L. ed. (Adv. 417), the Supreme Court passed upon the provision of the New Deal Legislation denying effect of the gold clause in existing private contracts.

After pointing out that the previous decisions of the Supreme Court construing clauses for payment in gold did not deal with situations corresponding with those now presented since these rulings were made when gold was still in circulation and no act of Congress prohibiting the enforcement of such clauses had been passed, the Court construed the contracts to be contracts for the payment of money and not contracts to be paid in gold coin as a commodity or bullion.

At this stage it became necessary to consider (1) The power of Congress to establish a monetary system and the necessary implications of that power; (2) the power of Congress to invalidate the provisions of existing contracts which interfere with its constitutional power; and (3) whether the clauses in question do constitute such an interference as to bring them within the range of that power.

The power of the Congress to establish a monetary system and to make treasury notes legal tender for debts previously contracted was settled, according to the Court, by the Legal Tender cases.

Authority establishing the power of Congress to invalidate the provisions of existing contracts which interfere with its constitutional power was found in the Legal Tender cases, especially in the concurring opinion in Knox v. Lee, 12 Wall. 457, 20 L. ed. 287. Authority also was found in the established principle that contracts, however expressed, cannot fetter the constitutional power of Congress. Under the later principle the court cites instances of annulment of contracts by legislation and reaches the conclusion that if the gold clause interferes with the power of Congress, in the exercise of authority, it cannot stand.

In holding that the Gold Contracts were obstructive to the monetary policy adopted by Congress the Court said: "It requires no acute analysis or profound economic inquiry to disclose the dislocation of the domestic economy which would be caused by such a disparity of conditions in which it is insisted, those debtors under gold clauses should be required to pay one dollar and sixty-nine cents in currency while respectively receiving their taxes, rates, charges and prices on the

basis of one dollar of that currency.

"We are not concerned with consequences, in the sense that consequences, however serious, may excuse an invasion of constitutional right.

"We are concerned with the constitutional power of the Congress over the monetary system of the country and its attempted frustration.

"Exercising that power, the Congress has undertaken to establish a uniform currency, and parity between kinds of currency, and to make that currency, dollar for dollar, legal tender for the payment of debts.

"In the light of abundant experience, the Congress was entitled to choose such a uniform monetary system, and to reject a dual system, with respect to all obligations within the range of the exercise of its constitutional authority.

"The contention that these gold clauses are valid contracts and cannot be struck down proceeds upon the assumption that private parties, and states and municipalities, may make and enforce contracts which may limit that authority.

"Dismissing that untenable assumption, the facts must be faced. We think that it is clearly shown that these clauses interfere with the exertion of the power granted to the Congress and certainly it is not established that the Congress arbitrarily or capriciously decided that such an interference existed."

Validity of Gold Clause in Gold Certificate.

In Nortz v. United States, 79 L. ed. (Adv. 442) the question certified by the court of claims was:

Is an owner of gold certificates of the United States, series of 1928, not holding a Federal license to acquire or hold gold coins or gold certificates, who, on Jan. 17, 1934, had surrendered his certificates to the Secretary of the Treasury of the United States under protest and had received therefor legal tender currency of equivalent face amount, entitled to receive from the United States a further sum inasmuch as the weight of a gold dollar was 25.9 grains, nine-tenths fine, and the market price thereof on Jan. 17, 1934, was in excess of the currency so received?

In answering that question in the negative the court said: "The asserted basis of plaintiff's claim for actual damages is that, by the terms of the gold certificates, he was entitled, on Jan. 17, 1934, to receive gold coin. It is plain that he cannot claim any better position than that in which he would have been placed had the gold coin then been paid to him. But, in that event, he would have been required, under the applicable legislation and orders, forthwith to deliver the gold coin to the Treasury. Plaintiff does not bring himself within any of the stated exceptions. He did not allege in his petition that he held a Federal license to hold gold coin, and the first question submitted to us by the Court of Claims negatives the assumption of such a license. Had plaintiff received gold coin for his certificates, he would not have been able, in view of the legislative inhibition, to export it or deal in it. Moreover, it is sufficient in the instant case to point out that on Jan. 15, 1934, the dollar had not been devalued, or, as plaintiff puts it, 'at the time of the presentation of the certificates by petitioner, the gold content of the United States dollar had not been deflated,' and the provision of the Act of March 14, 1900, supra, fixing that content at 25.8 grains, nine-tenths fine, as the standard unit of money with which 'all forms of money issued or coined by the United States' were to be maintained at a parity, was 'still in effect.' The currency paid to the

plaintiff for his gold certificates was then on a parity with that standard of value. It cannot be said that, in receiving the currency on that basis, he sustained any actual loss.

"To support his claim, plaintiff says that on Jan. 17, 1934, 'an ounce of gold was of the value at least of $33.43.' His petition so alleged and he contends that the allegation was admitted by the demurrer. But the assertion of that value of gold in relation to gold coin in this country, in view of the applicable legislative requirements, necessarily involved a conclusion of law. Under those requirements there was not on Jan. 17, 1934, a free market for gold in the United States or any market available to the plaintiff for the gold coin to which he claims to have been entitled. Plaintiff insists that gold had an intrinsic value and was bought and sold in the world markets. But the plaintiff had no right to resort to such markets. By reason of the quality of gold coin, 'as a legal tender and as a medium of exchange,' limitations attached to its ownership, and the Congress could prohibit its exportation and regulate its use."

Gold coin clause in Liberty bonds.

In Perry v. The United States, 79 L. ed. (Adv. 446) the Court draws a distinction between the power of Congress over contracts with private parties which interfere with its constitutional power, and the power of Congress to alter and repudiate its own engagements when it has borrowed money under the authority which the Constitution confers. By virtue of the power to borrow money "on the credit of the United States" Congress is authorized to pledge that credit as an assurance of payment as stipulated, as the highest security the government can give its plighted faith. To say, the Court continues, that Congress may ig-

nore that pledge is to assume that the Constitution constitutes a vain promise having no other sanction than the pleasure and convenience of the pledgor.

The Court states that the fact that the government cannot be sued without its consent is a mere matter of procedure which does not affect the legal and binding character of its contracts. While Congress is under no duty to provide remedies through the courts, the contractual obligation still exists and despite infirmities of procedure, remains binding upon the conscience of the sovereign.

Again, the Court points out, the Fourteenth Amendment in its fourth section explicitly declares: "The validity of the public debt of the United States, authorized by law, shall not be questioned." This provision embraces whatever concerns the integrity of the public obligations.

Under this view the Court was of the opinion that the Joint Resolution of June 5, 1933, in so far as it attempted to override the obligation of the United States was invalid, as going beyond the constitutional authority of Congress.

But notwithstanding its invalidity, the plaintiff must show damages in an action for breach of contract in order to recover, the Court of Claims not having authority to entertain an action for nominal damages. The change in the weight of the gold dollar did not necessarily cause a corresponding loss to the plaintiff. To determine his loss it was necessary to consider the economic situation at the time the government offered to pay him the face value of the bond in legal tender currency.

The discontinuance of gold payments and the establishment of legal tender currency on a standard unit of value with which all forms of money "of the United States were to be maintained at a parity" had a controlling influence upon the domestic economy. A free domestic market for gold was non-existent. Under these circumstances the value of the promised gold to the bondholder would be only its value as a medium of currency under a single monetary system with an established parity of all money and coins. Therefore in relation to buying power the plaintiff had not shown any loss whatsoever but on the contrary, in view of the availability and use of legal tender, the payment of the amount claimed by plaintiff would constitute not a recoupment of loss but an unjustified enrichment. Therefore the plaintiff failed to show a cause of action for actual damages.

Mr. Justice Stone in a concurring opinion suggests that the decision should be confined to the question of damages and refuses to join in that part of the opinion which suggests

Case and Comment
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that Congress went beyond its powers in abrogating the gold clause in Liberty bonds.

Dissenting opinion.

Mr. Justice McReynolds in a stirring dissenting opinion written as a dissent from all three of the cases just discussed said in part: "Mr. Justice Van Devanter, Mr. Justice Sutherland, Mr. Justice Butler and I conclude that, if given effect, the enactments here challenged will bring about confiscation of property rights and repudiation of national obligations.

"Acquiescence in the decisions just announced is impossible; the circumstances demand statement of our views. 'To let oneself slide down the easy slope offered by the course of events and to dull one's mind against the extent of danger, that is precisely to fail in one's obligation of responsibility.'

"Just men regard repudiation and spoliation of citizens by their sovereign with abhorrence; but we are asked to affirm that the Constitution has granted power to accomplish both.

"No definite delegation of such power exists; and we cannot believe the far-seeing framers, who labored with hope of establishing justice and securing the blessings of liberty, intended that the expected government should have authority to annihilate its own obligations and destroy the very rights which they were endeavoring to protect.

"Not only is there no permission for such actions; they are inhibited. And no plenitude of words can conform them to our charter.

. . . . . .

"Can the government, obliged as though a private person to observe the terms of its contracts, destroy them by legislative changes in the currency and by statutes forbidding one to hold the thing which it has agreed to de-

liver? If an individual should undertake to annul or lessen his obligation by secreting or manipulating his assets with the intent to place them beyond the reach of creditors, the attempt would be denounced as fraudulent, wholly ineffective.

"Counsel for the government and railway companies asserted with emphasis that incalculable financial disaster would follow refusal to uphold, as authorized by the Constitution, impairment and repudiation of private obligations and public debts. Their forecast is discredited by manifest exaggeration.

"But, whatever may be the situation now confronting us, it is the outcome of attempts to destroy lawful undertakings by legislative action; and this we think the Court should disapprove in no uncertain terms.

"Under the challenged statutes it is said the United States have realized profits amounting to $2,800,000,000(e) but this assumes that gain may be generated by legislative fiat. To such counterfeit profits there would be no limit; with each new debasement of the dollar they would expand. Two billions might be ballooned indefinitely—to twenty, thirty, or what you will.

"Loss of reputation for honorable dealing will bring us unending humilitation; the impending legal and moral chaos is appalling."

Conclusion:

It is not clear why the Supreme Court should have found it necessary to hold that Congress went beyond its power in the Liberty Bond case when the decision could have been entered on jurisdictional grounds. (Compare separate opinion of Mr. Justice Stone.) Whether the Court thought that it was its duty to lecture Congress on the morals of the situation, or whether it conceived itself as announcing a principle which would limit the power of Congress as to repudiation of future debts, or whether it had in mind concrete situations in which damage could be proved, questions of a highly speculative nature which will likely have to be answered more explicitly at a future date. In any event the Supreme Court has spoken and there is much food for thought in the several opinions, all of which should be read and studied by every student of government in the country.

Mooney Case—due process of conviction on known perjured testimony.

In Mooney v. Holohan 79 L. ed. (Adv. 347), a new phase of the celebrated Mooney case which for eighteen years has stirred the interest of the nation came before the Court. The prisoner convicted in 1917 of murder in the first degree for activities in connection with the "Preparedness Day" parade bombing in San Francisco in 1916 and sentenced to death but subsequently commuted to life imprisonment under evidence which was regarded by numerous people as being very weak, has made a ceaseless fight for freedom which has caught the attention of the press of the Nation. In the instant case seeking a writ of habeas corpus on the theory that he had been convicted on perjured testimony with the knowledge of the authorities, the Supreme Court although it upheld the prisoner's contention that such a conviction would be a denial of due process held that it did not sufficiently appear that the remedies in the state court had been exhausted and denied leave to file the writ without prejudice. If the petitioner can establish the facts alleged in the habeas corpus petition there seems to be no alternative for the California Court to follow but to avoid the conviction.

Mingle a little folly with your wisdom.—Horace.

Professional Perils.—Some time ago, writes a contributor, when real estate was an asset instead of a liability, a woman, of foreign extraction, engaged me to bring a suit to enforce specific performance of a contract to convey to her a piece of property. The writer prepared the papers and had them served on the defendant, who took them to his attorney, who examined them and told his client that if they stated the facts he would have to comply with his agreement and to defend was idle. He then called me, by 'phone, and said that the defendant was executing a deed and would come to my office and deliver the same, and asked me if I would wait and accept the deed and pay the balance of the purchase price. I agreed. It was the lunch hour and the office force, except myself, was out when the defendant, a rather burly and ill-favored man, and a friend—a very similar type—came into the office. Just as they stepped into my private office the plaintiff, without being seen by them, came into the outer office. The defendant, somewhat aggrieved at the abject surrender he deemed he was making, indulged in some loud and boisterous talk. I went to the outer office to get a paper, and there at the door to my private office stood my client with a baseball bat in her hands—she was no puny woman either. She said in a whisper, "I hear dem. Das all right, but if dey touch you I knock h— out of one of dem," then, possibly noting that as a fighting craft, I might not be so good, she added: "Oh, I knock h— out of bot' o' dem, by Got!"

I closed the transaction, not having been greatly alarmed as to anything the men might do, even if ample aid was not just outside the door, but did think that there might be some real danger if she should not like my bill for services when I presented it."

Contributor: Alpheus Byers,
Seattle, Wash.

A Long Wait.—In a case tried before our contributor the defendant was charged with desertion and non-support, he offered as a defense the following letter from the complainant, his wife:

"When the postman puts sand in the sugar, and the milkman makes milk out of chalk.

"When the boys stay at home with their mother and the girls forget how to talk; and after the ball game goes under and the railroad runs under the sea and the man in the moon comes down in a balloon, then, ———, you can come back to me."

Contributor: Judge Grey Anderson,
Galax, Va.

The Stingiest Man.—Two brothers, A and B, appeared on opposite sides in the same case. A had filed a complaint against B charging him with using abusive language. A was represented by the County Attorney, and his assistant, and B represented himself. A testified that B drove up in front of his house in a car, and stopped, directly in front of a large gate, in which there was a man-hole, and called A to come out which he did and swore that B at once began to curse and abuse him, and jumped out of the car and started toward him with piece of iron in his hand. A said he retreated through the man-hole in the gate and from the inside tried to calm B.

The County Attorney then turned A over to B to be cross-examined. B asked "You say there is a large gate there?" To which A replied, "Yes, you know where it is, you have been through it."

B, "You say there is a man-hole in [the] gate" to which A replied, "Yes, you [have] been through it too." B then asked [him] "What did you put that man-hole in [the] gate for" and before A could reply [he] added, "You know that you put that [man-] hole in that gate because you are [so] durned stingy that you wanted to [save] the wear of the hinges of your gate." [At] which the crowd, the Judge, the office[rs] the idle jurymen, and even the litigan[ts] were convulsed with laughter, and [when] quiet was restored, the Judge fined [him] One Dollar and the crowd dispersed.

Contributor: R. B. Hood,
Weatherford, Tex.

"And/or" Relief Bill Peeves.—Almo[st] every day Senator Carter Glass, of Vi[r]ginia, finds something new in the $4,88[0],]000,000 work relief bill he doesn't [like.] During his scrutiny today he found [the] measure contains seven "and/ors" in [the] sections granting authority to the Pre[si]dent.

"I think I'll introduce a bill to make a penal offense for a lawyer to write [an] 'and/or' in a bill," Senator Glass [said.] Subsequently the energetic Senator [was] successful in having struck from the [bill] all 'and/or' phrases.—*Recent news dispat[ch]*

And Keep Track of It.—"Here's a l[et]ter from Dunleigh asking that we [send] him a part of what's due him, and [en]closing a stamp for a reply. What [shall] I do about it?" asked one of the two [im]pecunious law partners.

"Send him back the stamp on account," replied the resourceful side-kick.—*Port[-]land (Me.) Express.*

Rest for the Weary.—Law Partner: "Did you enjoy your leave?"

Associate.—"Yes, but there's nothing like the feeling of a good desk until your feet again."—*U.S.S. Texas Star.*

Curse.—"Drink," said the Irish lawyer, "is the greatest curse of the country. It makes yer quarrel with yer neighbors, it makes yer shoot at yer landlord, and it makes yer miss him."—*Detroit Free Press.*

And the Last.—"Officer, you can't [arrest] me. I'm an A. B. and an A. M."

"Good; now we'll give you the third degree."—*Exchange.*

We Like a Regular Trade.—Prison Governor (to released convict)—"I'm sorry. I find we have kept you here a week too long."

Convict—"That's all right, sir. Knock it off next time."—*Louisville Times.*

Lawyer: "When the elevator fell with you I suppose all your sins flashed before your eyes?"

Witness: "Not all. We only dropped five stories."

—*Building Owner and Manager.*

Thirty Days!—Judge—"What were you doing in that place when it was raided?"

Locksmith—"I was making a bolt for the door."—*Wise Cracks.*

Friendly Enemies.—When the Court asked counsel for defense if he cared to cross-examine the witness, he replied: "No, Your Honor, he might want to kiss me."

"Kiss you?" shouted the witness. "If it was a case of kissing you or a cow, I would choose the cow."

"I am not surprised, Your Honor," shot back counsel, "he is so full of bull."

And He Did!—"Don't you think," airily suggested the new law partner, "that you ought to brush up a bit on your correspondence? Use big words; they lend dignity to your letters."

"Perhaps you're right," admitted the other, calmly studying the end of his cigar, "but, while eschewing mediocrity of expression through platitudinous phraseology, it behooves one to beware of ponderosity, and to be mindful that pedantry, being indicatory of an inherent megalomania, frustrates its own aim and results merely in obnubilation."—*Exchange.*

Too Many Horses.—In horse-and-buggy times a lawyer driving two horses stopped to spend the night with a friend. At the supper table the little boy of the home started to ask the lawyer a question, but his father said, "Be quiet!" Graciously turning to the child, the lawyer smiled and said, "Let the boy talk."

"Are both of those horses in the stable yours?"

"Yes," was the reply. "Why?"

"Well my father said you were a 'one-horse' lawyer."—*Exchange.*

A Tall One.—Lawyer: "See that man, Johnny? Well, he's six feet in his boots."

Lawyer's Son: "Gwan; you don't expect me to believe that. You might as well say he's six heads in his hat."—*Exchange.*

A Finished Product.—Lawyer: "I hear your boy has a gift for recitation, Mrs. Brown."

Mrs. Brown: "Yes, sir, indeed he has. His uncle says that all he wants is a course of electrocution, just to finish him off."—*Exchange.*

High Geared.—Lawyer to daughter—"Your boy friend talks too much. He rattles on like a flivver. I'm afraid he is a flat tire."

Daughter—"I know, pa, but his clutch is grand."

Life's Inequalities.—He was a good-natured Irishman, and was one of a number of men employed in erecting a new building. The owner of the building said to him one day:

"Pat, didn't you tell me that a brother of yours is a lawyer?"

"Yis, sor," replied Pat.

"And you a hod carrier! The good things of life are not equally divided, are they?"

"No, sor," said Pat. "Poor fellow! My brother couldn't do this to save his loife."

Not So Dumb.—Suspected of being mentally deficient, a schoolboy was asked by a psychologist:

"How many ears has a cat?"

"Two," the lad replied instantly.

"And how many eyes has a cat?"

"Two."

"And how many legs has a cat?"

The boy looked at him suspiciously.

"Say," he inquired, "didn't you ever see a cat?"—*Exchange.*